Arthur Sarnow Candy Co., Inc. *and* Local 805, International Brotherhood of Teamsters, AFL–CIO.[1] Cases 29–CA–14802 and 29–CA–14932

January 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 22, 1991, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed a response brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] We note that the judge inadvertently referred to the demeanor of witnesses although no testimony was presented at the hearing. We correct that error.

Although there is no dispute that Arthur Sarnow Candy Co., Inc. and Lilly Popcorn, Inc. are a single employer, the General Counsel excepts to the judge's finding that Sarnow and Lilly merged in 1985 when Corey Brooks purchased Sarnow. The General Counsel argues that the record does not support this finding and that it is possible that the merger occurred before the purchase. We find that whether the merger occurred before or at the time of the purchase does not affect the judge's conclusion that the parties' contracts were applied to union members only. We therefore find it unnecessary to rely on the finding concerning the timing of the merger.

Mark G. Pearce, Esq., for the General Counsel.
Sanford E. Pollack, Esq. (Horowitz & Pollack), for the Respondent.
Richard M. Greenspan, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on February 27 and April 25, 1991. The charges were filed on April 20 and June 18, 1990. The consolidated complaint issued on July 30, 1990, and an amended consolidated complaint was issued on October 25, 1990. The allegations are:

1. That despite agreeing to be bound to the terms of an associationwide collective-bargaining agreement, the Respondent has refused to execute a contract proffered to it on December 21, 1989.

2. That since on or about February 27, 1990, the Respondent has refused to furnish to the Union such books and records by which the Union could ascertain whether proper contributions have been made to certain benefit funds established by the aforesaid collective-bargaining agreement.

3. That since December 20, 1989, the Respondent has failed to make contributions to the various benefits funds.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. It also was stipulated for purposes of this proceeding, that Arthur Sarnow Candy Co., Inc. and Lilly Popcorn Inc. constitute a single employer within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Arthur Sarnow Candy Co., Inc. (Sarnow) and the Union have had a collective-bargaining relationship for many years. It is agreed that although not a member of Wholesale Tobacco Distributors of New York Inc. (a multiemployer association having contracts with the Union), Sarnow has agreed over the course of the years to adopt, on an individual basis, the terms and conditions of the Association contract as its own contract with the Union.

A complete contract was executed between the Union and Sarnow in 1974. The recognition clause in that contract is as follows:

> 1. Recognition
>
> (a) The Employer recognizes the Union as the sole and exclusive collective bargaining agent representing its employees excluding confidential employees, guards, watchmen, adjusters, canvassers and supervisors as defined in the Labor Management Relations Act.[1]
>
> (b) The provisions of this Agreement shall apply to all accretions to the bargaining unit, including but not limited to newly established or acquired businesses and consolidations of businesses.
>
> (c) Any additional classifications not presently covered shall become part of this Agreement when the Union represents a majority within any of the stated classifications and shall be subject to separate negotiations between the parties. The result of such negotiations shall be attached as an appendix to this Agreement, and become an integral part thereof.

In addition, the contract contained a union-security clause requiring all employees covered by the agreement to become members of the Union after 30 days of employment. The contract, among other things, required the Employer to notify

[1] The complaint as amended at the hearing alleges that the appropriate unit consists of all of Respondent's employees, excluding confidential employees, guards, watchmen, adjusters, canvassers, and supervisors as defined in the NLRA.

the Union of any newly hired employees as well as give the Union the opportunity to refer job applicants. Also, the contract required the Employer to recognize the Union's right to appoint shop stewards[2] and to have access to its facility.

Subsequent to 1974, the Union and Sarnow executed a number of successive agreements which continued the terms of the 1974 contract except as modified. In all instances, the agreements between Sarnow and the Union tracked the agreements made between the Union and the Association. The last executed contract is an agreement between the Union and Sarnow which ran for a term from September 15, 1986, to September 14, 1989.

The parties stipulated that Arthur Sarnow Candy Co., Inc. was purchased from the Sarnow family by Corey Brooks in June 1985. Although not entirely clear from this record, I presume that the purchased Company was then merged with the operations of Lilly Popcorn Inc. As is evident from the dates, the purchase of Sarnow predated the last executed contract.

On November 22, 1989, the Union and the Association executed a new agreement running for a term from September 15, 1989, to September 14, 1992. After execution, the terms of that agreement where tendered to the Respondent for its execution.

The Respondent, despite repeated requests by the Union in February and March 1990, has refused to execute the new agreement. There is, however, no evidence or suggestion that the Respondent agreed either orally or in writing to be bound by whatever agreement was reached between the Union and the Association. Rather, it is the General Counsel's theory that inasmuch as the terms of the tendered 1989 to 1992 agreement were applied to some (but not all) of the Respondent's employees, this shows that the Employer adopted the agreement. Alternatively, the General Counsel alleges that even if the new agreement was not adopted, the Employer without notice or bargaining, unilaterally changed the existing conditions of employment by not complying with the terms of the expired contract.

The parties agreed to the introduction of a variety of records, which in conjunction with other stipulations, were relied on by all parties in lieu of oral testimony.

There was introduced into evidence a series of union records showing the amounts which the Union billed the Employer for dues, pension and welfare contributions, and the amounts of money received. These records therefore evidenced the names and number of employees that the Union believed were in the bargaining unit based on whatever information it had available to it at the time. The records show that as of January 6, 1986, the Union billed and received payment on behalf of 14 employees; that as of September 11, 1986, the Union billed and received payment on behalf of 13 employees; that as of February 1987 the Union billed and received payment on behalf of 12 employees; that as of December 1987, the Union billed and received payment on behalf of 11 employees; that during 1988, the Union billed and received payment on behalf of 11 employees at the beginning of the year and 7 employees at the end of the year; that in 1989 and most of 1990, the Union billed and received payment on behalf of 6 employees; and that by January 1991, the Union was billing for only 4 employees.

Union-generated records also show that as of January 1989 the following employees were listed by the Union as active union members:

Fred Brakin	Antonio Goncalves
Robert D'Antonio	Theresa Kobylarz
Roberto Nunez	John Radtke
Joel Sarnow	

Thereafter, in June 1989 Goncalves was deleted as an active member. In November 1990, Theresa Kobylarz and John Radtke were deleted from the Union's membership list. As of January 1991, the total number of the Respondent's employees claimed by the Union to be members was four. (The number having been reduced by illness or retirement.)

On February 27, 1990, the Union's attorney wrote to the Employer as follows:

> We are Counsel to Local 805 IBT. Please be advised that our client will be conducting an audit of your books and records to assure that proper and full contributions have been made to the affiliated Welfare and Pension funds.
>
> The Union's auditor will be in contact with you directly to arrange for such audit which will commence for the period January 1, 1984. Please arrange to have such books and records as requested available.

The Respondent did not reply to the above letter and as far as this record suggests no such audit took place.

On September 19, 1990, the Respondent wrote to the Union enclosing checks for union dues, pension, and welfare contributions on behalf of five employees. (The letter noted that Theresa Kobylarz had been out sick since June 1990 and that as of August 31, 1990, John Radtke had retired.)

On October 12, 1990, the Union wrote to the Company and this apparently was the last written communication between the parties. This letter stated:

> We are in receipt of checks involving payments due to the Welfare Fund, Pension Fund and Union dues. These checks are accepted for payment on behalf of the employees listed on the remittance report. Please note that all payments are subject to review of payroll books and records to assure that payments are made on behalf of all employees. Your payments are not accepted as payment in full for employees who have not been reported.
>
> Additionally, monies outstanding are subject to interest charges which we note have not been paid. After an audit of your payroll books and records, a complete statement will be provided to you specifying the balances due.

Placed into evidence were company payroll records for the weeks ending January 7, 1987, December 2, 1987, May 2 and December 5, 1989. These were combined payroll records for both corporations with employees of Lilly Popcorn being given a 2000 series designation. Employees of Sarnow in 1987 were apparently given a 1000 series designation and in

[2] It was stipulated that employee Fred Brakin was the union shop steward until he ceased his employment in October or November 1990.

1989 were given a 3000 series designation.[3] These records show the following:

1. As of the payroll period ending January 7, 1987, there were 29 persons listed as employed by Sarnow and 24 employees listed as being employed by Lilly Popcorn.[4]

2. As of the payroll period ending December 12, 1987, there were 25 people listed as being employed by Sarnow and 27 people listed as being employed by Lilly Popcorn.

3. As of the payroll period ending May 2, 1989, there were 17 persons listed as being employed by Sarnow and 33 listed as being employed by Lilly Popcorn.

4. As of the payroll period ending December 5, 1989, there were 16 persons listed as being employed by Sarnow and 36 persons listed as being employed by Lilly Popcorn.

5. As of December 5, 1989, *all* of the Union's six members were employed in the Sarnow designated categories. Thus, of the four Sarnow drivers, three were union members; of the eight employees in the warehouse, one was a union member; and of the four employees in the office, two were members.

6. At no time have any of the people listed in Lilly Popcorn classifications been listed by the Union as its members and no dues, welfare, or pension payments have ever been made on their behalf.

It also was stipulated that as of the week ending December 5, 1989, six employees of the Respondent received a $33-per-week raise. (This being the raise set forth in the new union-association contract.) The only employees receiving the raise were the six employees who at that time were union members. (That is, Fred Brakin, Robert D'Antonio, Theresa Kobylarz, Roberto Nunez, John Radtke, and Joel Sarnow.)

III. ANALYSIS

The General Counsel's contentions are that the Respondent (consisting of Sarnow and Lilly Popcorn) has, since December 21, 1989, refused to execute a contract which it has adopted by its conduct; that the Respondent has failed to make various payments as required by that contract; and that the Respondent has, since February 27, 1990, refused to provide information so that the Union could administer the provisions of the contract. Underlying these contentions is the assertion that the collective-bargaining agreement is based on the Union's recognition as the agent of employees within a unit appropriate for bargaining purposes within the meaning of Section 9(a) of the Act.

The General Counsel and the Charging Party define the appropriate unit as comprising all of the employees of the two merged companies, excluding confidential employees, guards, watchmen, adjusters, canvassers, and supervisors as defined in the Act.

The Respondent asserts that at all times relevant since 1986 or 1987, the collective-bargaining agreement has been applied only to union members and therefore, with union acquiescence, there does not exist a unit appropriate for bargaining within the meaning of Section 9(a) of the Act.

As noted above, the Union was recognized as the representative of Sarnow employees more than 20 years ago. As such, it is presumed that such recognition was based on majority support. In any event, that cannot be challenged at this time due to Section 10(b) of the Act. *Brower's Moving & Storage Inc*., 297 NLRB 207 (1989); *Mr. Clean of Nevada*, 288 NLRB 895 (1988).

There is no evidence to show the size of the Sarnow work force at the time that Corey Brooks purchased that company in 1985. Nor do I know the number of people employed by either or both companies during 1986. What I do know is that notwithstanding the merger of the two companies, a collective-bargaining agreement was adopted by the Respondent to run from September 1986 to September 14, 1989. Based on the Union's records, showing the names of the employees that the Union billed for dues, pension, and welfare contributions, and comparing them to the Employer's payroll records over a similar period of time, it is concluded that the 1986–1989 collective-bargaining agreement was applied *only* to employees who were listed as being employed by Sarnow. Moreover, these records show that from 1987 (and perhaps even earlier) the collective-bargaining agreement was being applied only to those employees of Sarnow who were members of the Union.

While it is argued that the Union never agreed to have its contract applied only to union members; that its failure to enforce the agreement fully was merely the result of inattention or carelessness, I note that the Union has had a shop steward at the premises and there was no evidence that the Employer attempted to hide the existence of the contact from other employees. Nor is there any evidence that the Employer refused to meet with the Union, or that it made any efforts to impede the Union from talking with or having access to its employees. Article 35 permits the Union to have access to the Employer's premises ''for the purposes of adjusting disputes, investigating working conditions, collecting dues, and ascertaining that the Agreement is being adhered to.''

The contract that the Union negotiated with the Association in November 1989 was tendered to the Respondent for execution in December 1989. There is no evidence that the Respondent ever agreed to adopt that agreement and it has refused to do so. On the other hand, it did apply the new contract's terms to those Sarnow employees who were members of the Union. But by February 1990 the number of union members had been reduced to six and later reduced to four.[5]

An incumbent union normally enjoys a presumption of continued majority status, particularly during the term of an existing collective-bargaining agreement. *Pioneer Inn & Casino*, 228 NLRB 1263 (1977). Such a presumption may be rebutted during a contract's term if the contract is for mem-

[3] Inasmuch as all parties stipulated that Lilly Popcorn and Sarnow Candy constitute a single employer, I am under the impression that both share the same plant.

[4] Excluded from these numbers are names which appear more than once on the payroll records and persons listed as officers of the Company. It was agreed that anyone listed in the 2500 category was an officer of the Company.

[5] The General Counsel contends that the Respondent by its actions (if not its words) adopted the 1989–1992 contract reached between the Association and the Union. While it is true that the Company did apply the contract's terms to some of its employees, it did not, consistent with its past practice, apply those terms to the unit that the General Counsel argues to be appropriate. That is, the contract's provisions were applied to only 6 and then 4 individuals, who comprised less than 15 percent of the work force that is argued to be covered by the contract.

bers only or if the bargaining unit is not defined with sufficient clarity ''to warrant a finding that the contracts are ones to which a presumption of majority status can attach.'' *Ace-Doran Hauling & Rigging Co*., 171 NLRB 645 (1968); *McDonald's Drive-In Restaurant*, 204 NLRB 299 (1973).

In *Brower's Moving & Storage Inc*., 297 NLRB 207, 208–209 (1989), the Board stated:

> As the judge noted, it is well established in Board law that an incumbent union generally enjoys a presumption of continued majority status during the term of a collective-bargaining agreement. In *Ace-Doran Hauling & Rigging Co*., supra, the Board found a narrow exception to that general rule when two factors undermined the validity of the contract and the presumption of majority status. First, the Board found that the unit was not defined with sufficient clarity ''to warrant a finding that the contracts are ones to which a presumption of majority status can attach.'' Second, the Board found that both parties' practice under the agreements showed that the parties did not intend them to be effective collective-bargaining agreements, but merely arrangements to check off dues and to procure benefits for union members only. Similarly, in *Bender Ship Repair Co*., supra,[6] the Board found a ''patent ambiguity'' in the contractual unit definition and that the union acquiesced in the application of the contract to only a few favored employees. In *McDonald's Drive-In Restaurant*, supra, the Board adopted the judge's finding that the unit purported to be covered by the contract was ambiguous and that the union never bothered to enforce its contract.
>
> The aforementioned cases are distinguishable because the collective-bargaining agreement in this case suffers from no such infirmities. It clearly specifies the unit, and the judge specifically found it was not a ''members only'' contract. In addition, the Union ha[d] clearly taken affirmative steps to enforce its contract over the years.
>
> While no steward was appointed and no grievance filed, the Respondent admitted it never told its unit employees they were represented by the Union or that there was an applicable contract. Therefore, the employees were denied the knowledge necessary to seek assistance from the Union. And, as discussed earlier, the Union was also denied knowledge concerning the unit employes when it asked for it. the Union filed the charge here in October 1988 and has actively pursued it.
>
> Thus, we find that there is no evidence that the Union ever acquiesced in a repudiation of substantial portions of the contract or that the Union and the Respondent ever had an arrangement or understanding that would negate an intent to enter into a valid collective-bargaining relationship.

Unlike the facts in *Brower's* where the company only applied the contract to the owner's family members and hid the contract's existence from unit employees, the facts in the present case are to the contrary. There is no evidence that the Respondent denied the contract's existence to its employees or denied to them the knowledge necessary to seek the Union's assistance. Moreover, unlike *Brower's*, the Union, at all relevant times, had a shop steward at the Respondent's premises and had the right to visit and talk to employees at any time it chose to do so.

While it is true that the 1986–1989 collective-bargaining agreement (which was executed by the Respondent) describes a bargaining unit with sufficient clarity, it seems to me that the facts show that in practice, the parties have applied the contract at variance with the unit description. As noted above, I have concluded that (1) the contract was applied only to those employees listed as being employed by Sarnow, and (2) that the contract was applied only to those employees of Sarnow who were members of the Union.

In *Weber's Bakery*, 211 NLRB 1 (1974) (cited with approval in *Brower's* supra), the administrative law judge concluded that there was token compliance with past contracts as they were applied to only a few of the employees who otherwise would be included in the unit definition. The administrative law judge therefore concluded that the ''past purported collective-bargaining agreements . . . were sham and did not give rise to any presumption of majority status on the part of the Union.'' The administrative law judge stated:

> It is true that in *Ace-Doran*, *Bender Ship Repair* and *McDonald's* there were also insufficiencies in the bargaining-unit definitions. However, the opinion in each of the three cases clearly indicates that the same result would have been reached solely on the basis of the parties' practice under the purported agreements, without any question as to the appropriate bargaining unit. . . .

In *McDonald's*, supra at 309, the administrative law judge, in concluding that there was no bona fide collective-bargaining relationship, stated:

> [I]t is undisputed that the Union neither administered the contract nor serviced the employees. As a result, not only were the employees deprived of contractual benefits pertaining to such matters as wage rates, health and welfare fund contributions . . . but they were subjected to working conditions unilaterally imposed by the Respondent without any protest from the Union. Moreover . . . it was not until the closing days of the contract that the Union undertook to submit several employees grievances to the Company. In addition to the Union's indifference to employee interests, it did not serve its own much better. Although the contract contained union-security provisions, it did not bother to enforce them. Apparently, the Union was content with the few employees the Respondent periodically signed up for the Union and with the initiation fees and dues the Respondent deducted from the wages of these employees. It was only near the end of the contract term that the Union took more affirmative steps to enlist the Respondent's assistance to force the employees to join.

The facts in the present case are not as extreme as those in *McDonald's*. On the other hand they are, to my mind, distinguishable from *Brower's*. On balance, I am inclined to find that pursuant to the practice of the parties over at least

[6] *Bender Ship Repair Co*., 188 NLRB 615 (1971).

3 or more years, the collective-bargaining relationship has been limited to a members only situation. That is, whatever bargaining unit existed when Sarnow was a separate company, the unit became a de facto members only unit when Sarnow was acquired by Brooks and merged with Lilly Popcorn.

In view of the above, it is concluded that the presumption of continuing majority status cannot be applied to the facts of the present case. Further, as it is concluded that there does not exist an appropriate bargaining unit within the meaning of Section 9(a) of the Act, it therefore follows that a bargaining order cannot be granted pursuant to Section 8(a)(5) of the Act. Moreover, as the bargaining relationship is not enforceable pursuant to Section 8(a)(5) of the Act, it follows that I must also dismiss the complaint allegations that the Respondent unlawfully refused to furnish information which was relevant to the Union's need to enforce its contract.

CONCLUSIONS OF LAW

1. The Respondent, Arthur Sarnow Candy Co., Inc. and Lilly Popcorn constitute a single employer within the meaning of the Act and is an employer engaged in commerce within the meaning Section 2(6) and (7) of the Act.

2. The Respondent has not violated the Act in any manner as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.